No. 18255

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE ANTHONY ROSSETTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.

STATEMENT OF JURISDICTION.

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in Count One of a two-count Indictment following a jury trial.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal from the judgment under Sections 1291 and 1294 of Title 28, United States Code.

II.

STATEMENT OF THE CASE.

Count One of the Indictment, which is set forth as Appendix A, charges appellant together with co-defendant Pasquale Frank Crea with aiding and abetting the commission of the offense by co-defendant Joseph Patrick Kasamis of illegally importing approximately thirty-five pounds of marihuana into the United States from Mexico, in violation of United States Code, Title 21, Section 176(a) and Title 18, Section 2. The Indictment was returned March 14, 1962. [C. T. 2.]*

Co-defendant Joseph Patrick Kasamis was separately tried before a jury on April 10, 11 and 12, 1962, and was convicted by the jury on both counts of the Indictment on April 12, 1962. [C. T. 10-12.]

Appellant plead not guilty on May 29, 1962, to both counts of the Indictment and a jury trial was commenced before United States District Judge Fred Kunzel as to both appellant and co-defendant Pasquale Frank Crea on said date. Appellant's motion to strike the testimony of co-defendant Joseph Patrick Kasamis, or to grant a mistrial was presented and denied on May 29, 1962. [C. T. 49, R. T. 85-88.] Appellee rested its case on May 31 and a motion for acquittal was granted on both counts as to Crea and on Count Two as to Rossetti. [C. T. 51, R. T. 227-233.] Appellant rested, no further evidence being introduced, and renewed his motion for judgment of acquittal as to Count One. [R. T. 233, 242.] The jury returned a verdict of

*C. T. will refer to Clerk's Transcript of Record and R. T. will refer to Reporter's Transcript of Proceedings.

guilty as to appellant on Count One. [C. T. 52.] Appellant renewed his motion for judgment of acquittal which was denied. [R. T. 299-301.] Appellant filed a motion for judgment of acquittal or new trial. [C. T. 38, 40, 53.] Appellee filed its opposition [C. T. 56] and supplemental opposition. [C. T. 64.] The motion was denied on July 20, 1962. [R. T. 307-312; 315-329; 332-348.]

The Court sentenced appellant to seven years imprisonment on Count One of the Indictment. [C. T. 76, R. T. 350.] Appellant filed a timely notice of appeal. [C. T. 78.]

III.
ERROR SPECIFIED.

Appellant has specified the following points on appeal:

1. The trial court erred in admitting evidence of flight, in its instructions thereon and in not granting new trial to "rebut the inference of flight."

2. The trial court erred in allowing the testimony of co-defendant Kasamis and in its instructions upon said testimony.

3. The evidence is insufficient to support a conviction.

4. The statute under which appellant was charged "is and was unconstitutional."

IV.
STATEMENT OF THE FACTS.

At approximately 10:10 a.m. in the morning of February 22, 1962, co-defendant Joseph Patrick Kasamis, the sole occupant of a 1952 Oldsmobile, license ATW-911, drove said automobile into the United States from Mexico at San Ysidro, California. [R. T. 50-52.] Customs Inspector Thomas Welch asked Kasamis what he was bringing into the United States and Kasamis declared only a child's leather purse laying in the back seat of the car. [R. T. 52.] The inspector had no information on the car but observed that Kasamis appeared very nervous and asked him to open the trunk of the automobile which Kasamis did with the key thereto after turning the ignition off, taking the keys therefrom, and walking to the trunk of the vehicle. [R. T. 52.] The inspector did not observe anything hidden in the trunk at that time and with the ignition key furnished him by Kasamis drove the car to a secondary area where he searched the car. [R. T. 52, 53.] Marihuana seeds were observed on the floor mat in the back seat area of the car. Thereafter a burlap sack of marihuana was found in the trunk, behind a piece of cardboard behind the spare tire. Following that there were found concealed six kilo brick packages in a compartment under the hood back of the right fender and eight kilo packages in a similar compartment on the left side, totaling about thirty-five pounds of marihuana. [R. T. 55-56.] It was necessary to remove plates from the bottom of the automobile before the marihuana in the two compartments could be removed.

Agent Gates testified that marihuana was valued on the illicit market at that time in Tijuana at between $20.00 to $45.00 a kilo. [R. T. 196-198.]

Kasamis testified that he drove aforesaid Oldsmobile from Mexico into the United States; and that he had received the keys to said automobile earlier that same morning, February 22, 1962. [R. T. 79, 82-84.] Gates searched Kasamis later that morning at about 11:45 a.m. and found less than a dollar in change on his person. [R. T. 121.]

Prior to the date Kasamis drove said 1952 Oldsmobile into the United States from Tijuana, appellant had placed it on a lot for sale in Kasamis' home community. Homer Bodum, an owner of the Jet Center Motors in Lancaster, California, testified that on December 31, 1961, appellant alone brought said Oldsmobile on to his lot there where Rossetti signed a consignment for sale of same for $150.00 net to Rossetti. [R. T. 89-92.] The consignment signed "George Rossetti" read in pertinent part as follows: "I, the undersigned, hereby consign my Oldsmobile '52, License No. ATW-911 to Jet Motors." [Ex. 3.] The vehicle remained on Bodum's lot for about thirty days thereafter during which period appellant appeared on the lot two or three times [R. T. 92, 93] accompanied at least once by co-defendant Crea. The condition of the car was discussed with Rossetti who said he would fix a main bearing, but the automobile was removed from the lot without being sold to anyone else by Bodum. [R. T. 93-95.]

Marion Dickey, Deputy Sheriff, Kern County, California, was stationed in Rosamond in that county in

January and February of 1962, and had known Kasamis for some time in that area, as well as having seen him together with appellant and Crea in the latter part of January or early February at the Wayside Cafe in Rosamond and also in front of the cafe. [R. T. 218, 219].

Ethel Kasamis, testified that her son, Joseph Patrick Kasamis, was living with her at their home in Lancaster on February 20, 1962, and was working on "the car with his dad", when appellant pulled up about 11:30 a.m. that morning in a red and white car and talked with her son at the latter car for about five or six minutes. [R. T. 111, 113, 119.] Shortly after that her son entered the house, stayed about a minute, put on a jacket, returned to where appellant was waiting at the side of the red and white car, and left with him in said vehicle. [R. T. 113-114.]

Kasamis was next observed at 1:10 p.m. that same afternoon in the 1952 Oldsmobile, License ATW 911, by Los Angeles County Deputy Sheriff Girard Kipp, proceeding south on Highway 6 from the Kern-Los Angeles County line to Lancaster, in Los Angeles County, California. [R. T. 97, 98.] Kipp observed two persons in the car, recognized the driver as being Kasamis and followed the automobile for about twelve miles, stopping the car at about 1:37 p.m. that afternoon, when he recognized the passenger as co-defendant Crea, a person he had seen before. [R. T. 98, 102, 107.] Kipp examined the registration certificate of said vehicle which Crea produced from his wallet on which the name of Pasquale Crea appeared as the registered owner. [R. T. 103, 104, 108.] The registration certificate was returned to Crea, and Kasamis and Crea continued driving south in the vehicle. [R. T. 105, 108.]

Following this, on the night of February 21, appellant driving his 1954 Oldsmobile, license GFU-128, registered into the Holiday Inn Motel, San Ysidro, California, about two blocks from the Port of Entry into Mexico, with two other persons, as shown by the registration form signed by appellant on which he stated the number of persons registering as three and the license of his car GFU-128. [R. T. 147-150; 216, 217; Ex. 8.]

Following the discovery of the marihuana in the 1952 Oldsmobile, Customs Agent Gates went to the Lancaster, California area, where he later saw Mrs. Mowry, the manager of a motel or group of cabins known as Actis Gardens. Mrs. Mowry took Gates to the cabin of Rossetti on the afternoon of February 23, which was vacant of people but which was not clean and in which there were several old items of clothing as well as several items of food in the refrigerator. [R. T. 124-127.]

Mrs. Nita Mowry, the manager of Actis Gardens which constituted a group of small cabins located about six miles south of Mojave, California, testified that appellant and co-defendant Crea and their families moved into Cabin 16 and Cabin P respectively of said court at the same time and lived there continuously for about a year prior to February 22, 1962. Rossetti and his wife had a daughter Deborah, also known as Debbie, while Crea and his wife had no children. Both Rossetti and Crea operated vehicles including a red one by appellant, and both families and their vehicles were gone on February 23 when the manager went to appellant's cabin (Cabin P), which was unlocked and the personal things of the Rossetti family were gone. She locked up Cabin P with her master key, following which she

cleaned up the cabin and rented it to another person; and appellant never returned. [R. T. 162-167.] Arrangements at first were made to have the rent of appellant and Crea taken care of with one of the co-owners, Tony Actis, but "later on they were supposed to pay rent, but they didn't." [R. T. 168.] Mrs. Mowry never collected any rent at all at any time from appellant. [R. T. 168.]

Beatrice Keyes testified that on February 22, 1962, she resided in Cabin O, Actis Gardens, six miles from Mojave, California, which was next to the Cabin P in which appellant, his wife and daughter Debbie lived prior to that time. Co-defendant Crea and his wife who did not have children lived in Cabin 16. Mrs. Keyes was home on the afternoon of February 22 and right after the school bus arrived about 4:00 p.m., observed activity in the vicinity of Cabin 16 where Crea and his wife loaded their car and moved from that cabin. She continued to live in Actis Gardens but thereafter she did not see either one of the Rossetti or Crea families at the cabins heretofore occupied by them. [R. T. 156-160.] Other than having previously heard from appellant's daughter something to the effect that the Rossettis were going to move in July, she had not heard of any move other than that same afternoon, February 22 when Rossetti's daughter came in to say goodbye. [R. T. 161.]

Garlan Frix, the principal of Mojave Elementary School located in Mojave, California, testified that that school was in session on February 22 and that Deborah Rossetti whose address was Actis Gardens had been in attendance there from February 6, 1961, until February 22, 1962, which was the last day she attended, although

she was carried on the rolls of the school until March 6, 1962. Frix received no notification for the withdrawal of appellant's child from school. [R. T. 152-154.]

Frank A. Kern, Deputy Sheriff for the County of Kern, testified that his daughter, Kelly Lee Kern, attended school at the Mojave Elementary school about one block from his home in Mojave, California, on February 22, 1962, and that he saw his daughter and Deborah Rossetti at his home after school on that date. The two girls had previously played together frequently. The two girls left his house between 4:00 and 4:30 p.m. that date and about ten minutes later Deborah Rossetti's mother came by the house and he later saw his daughter about 4:45 or 5:00 p.m. but appellant's daughter was no longer with his daughter. [R. T. 221-224.]

Mario Cozzi, a Customs Agent stationed in New York City on March 13, 1962, saw a 1954 Oldsmobile, two-door hardtop, California license GFU 128 in that city, in front of a residence at 1460 85th Street, Brooklyn, New York. [R. T. 178.] Cozzi arrested appellant in said residence and appellant was asked by Agent Cozzi why he left California in a hurry and appellant stated that he didn't leave in a hurry; whereupon the agent asked when he had left and appellant "figured out the date, and he figured it was about February 19th." [R. T. 179.] Appellant admitted to Agent Cozzi that he and Crea had received $500.00 before he left California. [R. T. 179-180.] Appellant also admitted that the 1954 Oldsmobile observed in front of his New York residence, was his vehicle. Said vehicle was registered to appellant. [Ex. 12; R. T. 190.]

V.

ARGUMENT.

A. The Trial Court Did Not Err in Admitting Evidence of Flight and in Its Instructions Thereon.

At the outset it should be noted that the court instructed that evidence of flight of a defendant "is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by the jury in the light of all other proved facts in deciding the question of his guilt or innocence." The court then went on to instruct further "whether or not evidence of flight shows a consciousness of guilt, and the significance, if any, to be attached to such a circumstance, are matters for determination by you, the jury."

The government submits that the facts fully warranted the giving of such an instruction especially in the manner in which it was worded. Rossetti had been identified by witness Bodum as consigning his 1952 Oldsmobile, license ATW 911, for sale on December 31, 1961, which automobile was thereafter about 30 days later taken off the lot without having been sold. Rossetti was then identified by Mrs. Kasamis as picking up her son, co-defendant Kasamis, in a red and white automobile about 11:30 a.m. on February 20, 1962, at her home in Lancaster, California. In the early morning hours of February 22, 1962, Rossetti was in a motel at San Ysidro, California, a couple of blocks from the San Diego Port of Entry with two other persons it may reasonably be inferred were Kasamis and Crea, in his 1954 Oldsmobile, license GFU 128, on which registration the night of February 21, he gave an address in Lancaster which was not his correct

address. Kasamis, from Lancaster, was shortly thereafter apprehended at the port of entry in Rossetti's 1952 Oldsmobile at about 10:10 a.m. on February 22, with approximately 35 pounds of marihuana packed in said automobile to which he had received the keys earlier that morning. Part of the marihuana was in a gunny sack in the trunk of the said automobile which Kasamis opened with a key to said trunk.

The government's evidence further showed that both Rossetti and his friend, co-defendant Crea, lived at the Actis Gardens in Mojave with their families until February 22, the day of Kasamis' apprehension when both families suddenly moved. The daughter of defendant Rossetti, Deborah Rossetti, had commenced school on February 6, 1961, attending the Mojave Elementary School, to and including February 22, 1962, after which she was absent although carried on the rolls until March 6, 1962, there having been no notification received by the principal as to her withdrawal. Mrs. Beatrice Keyes, the next door neighbor of the Rossettis, and Nita Mowry, manager of the Actis Gardens, testified that defendant Rossetti and his family lived at Actis Courts until February 22. Their testimony, taken as a whole, reflects that both of the entire families left the area between 4 and 5:00 p.m. on February 22. Previously Mrs. Keyes had understood that the Rossettis were going to move in July but on the night of that afternoon, February 22, for the first time Deborah Rossetti advised that they were then moving. Prior to the time Deborah Rossetti told the Keyes that they were leaving, she had not come home from school but instead had stayed with the daughter of Mr. Kern about a block from the Mojave Elementary School where his

daughter and Deborah attended school. The two young girls left Mr. Kern's house about 4 to 4:30 p.m. and thereafter ten or twenty minutes later Deborah's mother, defendant's wife, came looking for her daughter and obviously located her shortly thereafter.

On March 13, 1962, Customs Agent Cozzi observed Rossetti's Oldsmobile, California license GFU 128, in front of a residence in New York where he later talked to Rossetti. Significantly, at that time Rossetti, in stating that he didn't leave California in a hurry, placed the time of his departure from California at about February 19, or three days earlier than the date when he was in fact in California. The government contends the appellant thus deliberately placed himself in Arizona at the home of Pat Crea's brother or cousin at least two days before a time when he knew that he had been in a motel in San Ysidro. The actions surrounding the hurried moving of himself and his family from Actis Gardens in Mojave to New York were certainly evidence of his flight which could be considered in the light of all the circumstances. The jury had a right to determine the significance, if any, of these actions, occurring as they did in Mojave, and later in New York, particularly with relation to the apprehension of Kasamis in appellant's vehicle, and the location of appellant in the same vicinity as Kasamis earlier the same day.

Appellant has produced a letter from the school teacher presumably as evidence that here was at most a mere coincidental departure by the defendant. [C. T. 53.] However, the point which the government would make is that the circumstances here show a hurried departure of the nature which constituted flight, irregard-

less of the fact the Rossettis might have been planning to leave the Mojave area at some future time. Even considering this letter at its face value, the facts still show that the departure was obviously unplanned on the date it took place, for a person who has been two-hundred miles away from home a short time before doesn't move or cause his family to be moved in the manner in which it was moved here unless it was more than a mere departure. Also see letter dated 7-16-62 of Miss Blakey, Exhibit II [C. T. 64], in which the teacher of Deborah was not advised either by appellant's daughter or her parents that Deborah Rossetti would not return to school on February 23, 1962. Therefore, the suggestion of appellant that Rossettis had advised others of a contemplated future move does not of itself preclude the jury from determining what, if any, significance was to be attached to the circumstances of the move which was in fact made.

The fact that there was not evidence of later concealment of the nature of denial of identity or change of identity many miles across the country from Mojave in New York City on March 13 when interviewed by a Customs Agent there does not render the other evidence inadmissible. For as stated in *Gicinto v. United States,* 212 F. 2d 8, 11, cert. denied 348 U. S. 884 (1954), evidence of flight is always admissible, especially when the conduct of the defendant is apparently inconsistent with innocence. In the *Gicinto* case, *supra,* there does not appear to be any evidence of subsequent concealment. In fact the only evidence of flight, gleaned from a reading of the Circuit Court opinion, which was produced in that case was the obtaining of a passport by defendant immediately preceding the commission of

the crimes alleged. Trial counsel in the case below, *United States v. Gicinto,* 114 F. Supp. 204 (W. D. Missouri, 1953), had previously moved for a judgment of acquittal or in the alternative for a new trial including a ground directed to this same point. However, the trial court pointed out that the passport was offered as evidence of flight and added at page 205 that such evidence was competent in the light of all the circumstances.

As to the contention that appellant could not have anticipated that the government would have offered evidence of the moving of his family to New York, the record on this phase shows an awareness of the situation now sought to be broached in greater detail. On cross-examination of the school principal, Mr. Frix, and of the neighbor, Mrs. Keyes, inquiry was made as to whether the Rossetti family contemplated moving by contacts by Mrs. Rossetti or Deborah with Deborah's teacher or neighbors. Furthermore, counsel for Rossetti had available before the trial of Rossetti, which commenced May 29, 1962, the transcript of the trial of Kasamis [see R. T. 46, 47] which started April 10, 1962, after the arrest of Rossetti on March 13, 1962. It certainly could have been anticipated from the knowledge which counsel for appellant then had both from the record of that case and his clients Rossetti and Crea that their move from Actis Gardens on the same date as Kasamis' apprehension would be a factor in their case.

Because of the failure of appellant to offer any evidence in rebuttal, on flight, to ask for time within which to offer such evidence, and to show any real basis for that failure, there is lacking the convincing

showing of exceptional circumstances essential to the exercise of the trial court's discretion in granting a new trial.

As stated in *United States v. Soblen,* 203 F. Supp. 542 (1961) at page 564 (affirmed 301 F. 2d 236), "A motion for new trial in a criminal case will be granted with caution and only in exceptional circumstances." The trial court goes on there to point out the wide discretion which the court has in determining a motion for new trial and the fact that the burden of proving grounds to support the motion for new trial rests upon the defendant. (p. 564.)

Finally, in passing on a motion in the *Soblen* case for a new trial upon allegedly newly discovered evidence, the trial court stated as follows: (pp. 564, 565.)

> "A motion for a new trial will be denied where the defense fails to prove its due diligence to secure, before or during the trial, the allegedly newly discovered evidence.
>
> "Where the allegedly newly discovered evidence was known to the defense or readily obtainable by it before or during the trial and the defense trial strategy was not to utilize such known or obtainable evidence during the trial, the decision by the defense to change its strategy after an unfavorable verdict does not render the evidence 'newly discovered.' "

It is submitted that the trial court properly received and instructed the jury on the evidence of flight in this case; and properly denied the motion for new trial.

B. The Trial Court Did Not Err in Allowing the Testimony of Co-Defendant Kasamis and in Its Instructions Thereon.

Co-defendant Kasamis was called as a witness by the government and testified as set forth in Appendix B that he had entered the United States in a 1952 Oldsmobile, green and black, on Thursday morning, February 22, 1962; that he opened the trunk of that vehicle for a Customs official at that point; and that he had received the keys to that automobile that same morning. [R. T. 79, 82-84.] Kasamis had taken the stand and testified similarly on these points in his own behalf at an earlier trial. No questions on any other points [R. T. 80-82] were asked by counsel for the government.

The witness claimed that the answers to the questions would incriminate him under the Fifth Amendment, but answered the questions after being directed to answer the first question. The defense objected to the government calling this witness because defense counsel advised the prosecution that he, defense counsel, had been advised by said witness that said witness would claim a privilege against self-incrimination. [R. T. 48.] The prosecutor advised the court that the government felt it had the right to call the witness as to certain limited matters which the witness had stated both in an original statement to customs agents and at his trial. [R. T. 48.]

The claim that the answers to the three questions which co-defendant was called upon to answer would tend to incriminate him of a possible conspiracy or marihuana tax violation in addition to his conviction on the

charge of illegally importing and concealing marihuana in violation of Section 276(a) seems untenable in view of the prohibitions against subsequent criminal prosecutions under the double jeopardy clause of the Constitution. See, *Sealfon v. United States,* 332 U. S. 575; also *United States v. Sabella,* 272 F. 2d 206, 211 (2nd Cir. 1959.)

In any event, the privilege could only be claimed by Kasamis and he waived it by voluntarily testifying at the first trial. It is pointed out in *Rogers v. United States,* 179 F. 2d 559, that when the constitutional right of a witness not to incriminate himself by his own testimony comes into conflict with the right of the Government to adduce the testimony of every citizen in criminal prosecutions, the court must give both principles a reasonable construction, so as to preserve them both to a reasonable extent. *Burr v. United States,* 25 Fed. Cas. 38. The Supreme Court in affirming the foregoing Tenth Circuit case of *Rogers v. United States, supra,* noted that the privilege is purely a personal one for the benefit of the witness and that it may be waived. If waived, the Supreme Court states, and a witness has voluntarily answered as to materially criminating facts, he cannot invoke the privilege to avoid disclosure of the details. This reasoning applies, *a fortiori,* when the questions asked pertain to facts to which a witness already testified at an earlier date, and answers beyond his previous testimony were not asked for by the prosecution. This court in *Hashagen v. United States,* 283 F. 2d 345, at page 354 (1960), held that a witness could not refuse to answer a question calling for an answer seeking to elicit the same fact which her

prior testimony had revealed. It was therefore proper here to elicit the same facts which Kasamis' prior testimony had revealed.

The cases cited by appellant pertain to those instances in which the witness refused or was not required to testify and are not appropriate, for in this case the witness did testify. Therefore, no error and certainly no plain error was committed in not instructing the jury in a manner similar to those cases as is belatedly urged by counsel. See Rules 30 and 52, Federal Rules of Criminal Procedure. This case is readily distinguished from the case of *United States v. Hiss,* 185 F. 2d 822 (2nd Cir. 1950), where the witness Rosen was called over objection of defendant by the government, knowing that he would refuse to answer some of the questions. The witness there did claim the privilege against self incrimination and refuse to answer certain questions. Notwithstanding, the court, noting the view of Professor Wigmore that the privilege was but an option to refuse to answer and not a prohibition of inquiry, affirmed. Here it cannot be said that prosecution had knowledge of an impending refusal of the nature of that in the *Hiss* case, particularly in view of the invalidity of the instant claim and the answers ultimately given.

The advice of the defense to the prosecution that the witness would take the Fifth Amendment when called was without substance and furthermore was immaterial. As in the case of *United States v. Romero,* 249 F. 2d 371 (2nd Cir. 1957), Kasamis was in the position of any witness subject to court process and he could have been compelled to testify for either side. As here, the

witness in the *Romero* case, Ottomano, had previously been convicted for his part in the same transaction concerning which he was called to testify as to a party thereto. The Supreme Court in *Reina v. United States*, 364 U. S. 507, at 513 cites the *Romero* case, *supra,* for the proposition that "the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime." See also *United States v. Cioffi* (2nd Cir. 1957), 242 F. 2d 473. In the case of *United States v. Gernie* (2nd Cir. 1957), 252 F. 2d 664, Cert. Den. 78 S. Ct. 1006, it was urged that it was error for the government to call a witness in view of his refusal to testify regarding the source of heroin of which he had admitted possession. The court held that the government had a right to bring forward such witnesses as may have had knowledge bearing on the case, and under such circumstances it made no difference whether the government had reason to believe that the witness would refuse to testify. In this case the witness, Kasamis, by way of contrast to the witness in the *Gernie* case who refused to testify, did finally testify.

In conclusion, the claimed Fifth Amendment privilege of Kasamis had been waived by his previous voluntary testimony, was not well taken, and in any event the government had a right to call him.

C. The Evidence Amply Supports the Jury's Verdict of Guilty.

A conviction should be sustained on appeal if there is substantial evidence, taking the view most favorable to the government to support it. In considering the facts the reviewing court must grant every reasonable intendment in favor of appellee.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir. 1956), Cert. Den. 350 U. S. 954 (1956);

Bolen v. United States, 303 F. 2d 870, 874 (9th Cir. 1962).

A brief review of the evidence demonstrates that appellant procured Kasamis as a "mule" in a scheme to smuggle marihuana into the United States and aided and abetted that smuggling in a vehicle in which appellant had an interest and in which was carefully concealed 35 pounds of marihuana. The amount of the contraband was so substantial that it had to be packed in three locations in said vehicle, including the trunk, to which Kasamis had the keys furnished to him just prior to entry that morning. That the contraband was effectively concealed is unquestioned because it was not found until examination at the secondary inspection at the San Ysidro Port of Entry. A Federal crime of smuggling has been made out.

There is substantial evidence that appellant procured Kasamis to go to Tijuana for the purpose of smuggling marihuana and aided and abetted him in the commission of the offense.

First, consider what it required for Kasamis to succeed in bringing this amount of marihuana into the United States. He had to be able to get to Tijuana, to have the money to purchase the marihuana, and most important to have an automobile to drive it across the international boundary into the United States. Kasamis had none of these means at his home in Lancaster at about noon on February 20. On the other hand appellant had money as well as an automobile. In less than two days from that time when appellant came to Kasamis' house and got him, Kasamis was in appellant's vehicle with marihuana worth $350.00 to $500.00 at San Ysidro 200 miles from his home with less than $1.00 in his pocket.

At the time Rossetti picked up Kasamis the latter was in Lancaster, California, without any money working with his father at home. After a short argument appellant persuaded Kasamis to come with him. That it was to be a trip in the 1952 Oldsmobile is shown by the fact that after talking with appellant, Kasamis came in to his house, got his jacket, and thereafter within an hour and a half was driving that car south with Crea as his passenger. Appellant had exercised ownership rights to that automobile prior to the time Kasamis entered the United States with it on February 22. The evidence has shown that there was no interest adverse to appellant in said vehicle from December 31, 1961 to the time Kasamis entered the United States with it. Appellant's continuing interest in the vehicle is corroborated by Kasamis' presence, as well as that of Rossetti's close friend Crea, therein shortly after Kasamis was picked up by appellant. Crea's production

from his pocket of the car registration in his name is also consistent with appellant's continuing interest and consent for Kasamis' use, in view of the prior association of these three persons together and the joint interest shown by Rossetti and Crea in its sale before the car was withdrawn from the lot. The interest of Rossetti and his dominion and control over this vehicle has been shown to be greater than that of appellant in the vehicle in which heroin was brought into the United States in case No. 17,966, *O'Neal v. United States,* affirmed by this court November 21, 1962.

Appellant also proceeded south in his 1954 Oldsmobile, license GFU-128, after picking up Kasamis, for Rossetti registered in a motel two blocks north of the port of entry from Tijuana with two other persons the night of February 21. It is reasonable to infer from the evidence that Rossetti picked up Kasamis in Lancaster, took him to the 1952 Oldsmobile, in which Kasamis and Crea proceeded to the same motel into which they were registered by Rossetti. Why else would appellant be that far from his home in that motel, close to where his car was found, except for the purpose of shepherding said car through the port of entry with its extremely valuable cargo?

Shortly after this of course Kasamis was caught in this same 1952 Oldsmobile, with thirty-five pounds of marihuana therein, including a substantial amount in the trunk, having keys to the ignition and the trunk. to which he had come into possession that same morning prior to 10:00 a.m.

In addition to the foregoing circumstances, consider also appellant's actions following the apprehension of

Kasamis. Rossetti left the vicinity two blocks from the Port of Entry where Kasamis was stopped and after a period of time which it would take to drive from San Ysidro to his home at Actis Gardens, great activity occurred there. After the school bus arrived at Actis Gardens and Deborah had not returned home, Rossetti's wife picked up her daughter from a point a considerable distance away where she was playing normally with a school friend. Rossetti's family and the Crea family which lived adjacent and had come to Actis Gardens at the same time about a year ago, both moved at about 5:00 p.m. on February 22. No notice was given by the Rossetti family to the daughter's school of a move to occur at this time, and no arrangements were made with the landlady then in charge of their rent. The first that an adjacent neighbor learned of a contemplated move on that particular date was just before the family left when the daughter came in to say good-bye. Rossetti had been living with his family until February 22 and the jury could reasonably infer from all the circumstances that he left San Ysidro when his car failed to come through the Port, hurried home gathered the family belongings together and left with his family in great haste. Why else would appellant leave in such a manner except for the fact that his attempt to shepherd his car with marihuana through the Port of Entry had failed?

As previously stated, the evidence must be viewed in the light most favorable to the Government, including the reasonable inferences to be drawn therefrom.

Bolen v. United States, supra.

All personal belongings of the Rossetti family were gone on February 23 the next day; Rossetti did not thereafter return to his home and was located across the country in New York City on March 13, 1962. The conduct of appellant in his flight from California without making any plans for taking his child out of school; without taking care of his rent or otherwise notifying the manager of the court; abandoning his vehicle which Kasamis was driving; and in making a deliberately false statement to Agent Cozzi that he had left the area on a date about three days earlier than February 22 all showed a consciousness of guilt of the offense charged.

Taking all the circumstances into consideration it must be concluded that a reasonable minded trier of fact could find beyond a reasonable doubt that appellant knowingly aided and abetted Kasamis in bringing in the marihuana.

D. The Statute (21 U. S. C. 176(a)) Is Constitutional.

Appellant, convicted of aiding and abetting co-defendant Kasamis in the commission of the offense of illegal importation of marihuana in violation of Section 176(a) of Title 21, United States Code, apparently contends this statute is unconstitutional in that compliance with the customs laws calling for invoicing, inspection, entry, and/or declaration of any marihuana to be imported into the United States require admission of possession of marihuana and thus incriminate him of a violation of a separate and distinct federal offense, namely, Section 4744 of Title 26, United States Code.

Appellee first contends that possession of marihuana *per se* does not provide the basis for conviction of instant Federal offense nor of a violation under Section 4744 of Title 26, in the sense urged by appellant. To be a Federal offense under Count One, the marihuana must have been smuggled or imported contrary to law; while under Section 4744 of Title 26 it must have been acquired contrary to law. That is, the offense under Section 4744 arises from the avoidance of Federal tax or the failure to comply with the Federal tax laws, as distinguished for instance from a State offense of possession of an article made contraband by state law.

Of course any claim that State law prohibits the possession of a particular article such as marihuana would not give an importer of that marihuana a license not to comply with Federal Customs laws under the guise of the privilege against self-incrimination assuming he could possess it in a State prior to importation. The importer's own wrong, that is, possessing an article made contraband by State law, would not make it right for him to disobey Federal Customs laws that have to be complied with by persons bringing into the United States such an article. It is well settled that the privilege against self-incrimination cannot be invoked Federally on the ground of self-incrimination under the laws of State jurisdiction. See *United States v. Eramdjian,* 155 Fed. Supp. 914-925 (D.C. S.D. Cal., 1957) and *Reyes v. United States,* 258 F. 2d 774-778 (9th Cir. 1958). In the *Eramdjian* case Judge Carter exhaustively discussed the question of self-incrimination in connection with the registration requirements of Section 1407, Title 18, United States Code, and found it

did not violate the Fifth Amendment because registration might lead to State prosecution. In *Reyes,* this Court specifically adopted Judge Carter's opinion.

A contention was made to this Court in case No. 18,154, *Wilson v. United States,* that Section 4705(a) of Title 26, United States Code was unconstitutional as compelling a person to be a witness against himself. This Court on February 4, 1963 pointed out that this section requires the purchaser of the narcotics to sign the written order, not the seller, and indicated that the cases of *Russell v. United States,* 306 F. 2d 402 (9th Cir. 1962) and *United States v. Kahriger,* 345 U. S. 22 (1953), apparently relied upon by Wilson, were inapposite.

The *Kahriger* case states that the privilege of self-incrimination has relation only to past acts, not to future acts which may or may not be committed. The *Russell* case, pertaining to the requirement of every person of Section 5841 of Title 26, to provide information (concerning firearms possessed) as to past conduct or present status which is actually or presumptively unlawful also seems inapposite to requirements which essentially pertain to future conduct, to wit: the presentation of invoices, entries and declarations concerning articles to be brought into the United States from a foreign country. It follows that even if such a declaration could be construed as constructive possession, such would certainly not be possession within the meaning of the holding in the *Russell* case. See Note 18, *Russell v. United States, supra.* Nor was this prosecution as to Rossetti based upon possession as to him. No instructions were given as to this appellant on the so-called statutory presumption in Section 176(a) upon

which appellant relies as establishing his point. Notwithstanding this, Rossetti while not suffering a conviction based upon the theory here advanced, seeks to be allowed to turn the Fifth Amendment into a sword to strike down by his own wrong doing the statute under which he was convicted.

Assuming *arguendo* that appellant has standing to raise this claim and further that compliance with the customs laws would tend in some way to incriminate an importer of marihuana, Federally, he would and should not be excused from compliance on that ground. See the *Eramdjian* and *Reyes* cases, *supra,* citing with approval at pages 927 and 781, respectively, *United States v. Dalton,* 286 Fed. 756 (D.C. W.D. Wash. 1923).

In the *Dalton* case defendants were indicted for smuggling merchandise (liquor) which was contraband by Federal law and claimed that since a declaration would compel them to incriminate themselves under the National Prohibition Act they could not be prosecuted for failing to comply with Customs laws. The Court stated at page 757:

> "It was incumbent on the defendants not only to declare the entry, but also to obtain a permit qualifying the goods for entry, and for having failed may not hide behind the Fifth Amendment when apprehended and evade penalty of the illegal act, and make a right out of two wrongs. The Fifth Amendment has no application where parties or goods seek admission into the United States, . . ."

VI.
CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the court below should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

CERTIFICATE.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ELMER ENSTROM

APPENDIX A.

Indictment.

(U. S. C., Title 21, Sec. 176(a); U. S. C., Title 18, Sec. 2—Illegal importation of marihuana; Receipt and concealment of illegally imported marihuana; aiding and abetting.)

In the United States District Court in and for the Southern District of California, Southern Division.

January, 1962, Grand Jury—Southern Division.

United States of America, Plaintiff, vs. Joseph Patrick Kasamis, Pasquale Frank Crea, George Anthony Rossetti, Defendants. No. 30745-SD.

The Grand Jury charges:

COUNT ONE

On or about February 22, 1962, in San Diego County, within the Southern Division of the Southern District of California, defendant Joseph Patrick Kasamis, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately thirty-five pounds of bulk marihuana, which marihuana should have been invoiced, and knowingly imported and brought into the United States from Mexico said marihuana contrary to law, in that said marihuana had not been presented for inspection, entered and declared as provided by United States Code, Title 19, Sections 1459, 1461, 1484 and 1485; and defendants Pasquale Frank Crea and George Anthony Rossetti knowingly aided, abetted, assisted, counseled, induced and procured the commission of the aforesaid offense.

COUNT TWO

(U.S.C., Title 21, Sec. 176(a);
U.S.C., Title 18, Sec. 2)

On or about February 22, 1962, in San Diego County, within the Southern Division of the Southern District of California, defendant Joseph Patrick Kasamis, with intent to defraud the United States, knowingly received, concealed, and facilitated the transportation and concealment of approximately thirty-five pounds of bulk marihuana, which marihuana, as the defendant Joseph Patrick Kasamis then and there well knew, had been imported and brought into the United States contrary to law; and defendants Pasquale Frank Crea and George Anthony Rossetti knowingly aided, abetted, assisted, counseled, induced and procured the commission of the aforesaid offense.

A True Bill

/s/ Richard C. Adams
Foreman

/s/ Francis C. Whelan
Francis C. Whelan
United States Attorney

APPENDIX B.

The Following Excerpts Are Taken From the Reporters Transcript of Co-Defendant Kasamis at R. T. 43, 46, 47, 48. Direct Examination by the Government.

"Q. Mr. Kasamis, did you enter the United States in a 1952 Oldsmobile, green and black, on Thursday morning, February 22, 1962? A. I decline to testify on the grounds of the Fifth Amendment of self-incrimination. [R. T. 43.]

* * *

The Court: I will direct the witness to answer the question. Will you repeat the question? [R. T. 46.]

(The question was read.)

Mr. Steward: For the record, Your Honor, I will object to the question on the ground stated earlier outside the presence of the jury, if I may make reference to that.

* * *

The Witness: The answer to the question is: yes, I did.

By Mr. Enstrom: [R. T. 47.]

Q. Did you open the trunk of that vehicle for a Customs official at that point? [R. T. 83]

* * *

The Witness: At the time I was stopped at the Border?

The Court: Yes.

The Witness: Yes, I did open it.

By Mr. Enstrom:

Q. When did you receive the keys to that automobile which you were then operating?

* * *

The Witness: Yes, I received the keys on Thursday; on Thursday. [R. T. 48]

Q. That same Thursday. A. February 22nd, I believe; Thursday."